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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. SC-05-1338-TBMo
	)	
PETER LYNN GAUGHEN,	)	Bk. No. 03-00010-JH12
	)	
Debtor.	)	
	)	
PETER LYNN GAUGHEN,	)	
	)	
Appellant,	)	
	)	
v.	)	**MEMORANDUM**[1]
	)	
SILVER MOUNTAIN CHRISTMAS TREES; NORTHWEST TREE SALES; ALPINE FARMS; DAVID L. SKELTON, Trustee,	)	
	)	
Appellees.	)	

Argued on March 23, 2006
at Pasadena, California

Submitted on March 31, 2006

Filed - May 2, 2006

Appeal from the United States Bankruptcy Court
for the Southern District of California

Honorable John J. Hargrove, Bankruptcy Judge, Presiding.

Before: TCHAIKOVSKY,[2] BRANDT and MONTALI, Bankruptcy Judges.

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[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2]Hon. Leslie Tchaikovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

Appellant Peter Lynn Gaughen ("Gaughen" or "Appellant") seeks reversal of the bankruptcy court's order declaring the claims of Alpine Farms ("Alpine") and Northwest Tree Sales ("Northwest") excepted from the discharge that he hopes to receive upon completion of his chapter 12 plan. For the reasons stated below, we REVERSE the portion of the order challenged.

FACTS

Between 1999 and 2001, Appellant commenced four cases under chapter 13 of the Bankruptcy Code.[3] On January 2, 2003, while the fourth chapter 13 case was still pending, Appellant filed a fifth petition, this time seeking relief under chapter 12 (the "chapter 12 case"). A plan was confirmed on August 26, 2003 but has not yet been fully performed by Appellant. Thus, Appellant has not yet received a discharge. See 11 U.S.C. § 1228(a).

The schedules of assets and liabilities (the "Schedules") accompanying Appellant's chapter 12 petition listed only three creditors: i.e., Chase Manhattan Mortgage Corporation, Household Finance Corporation, and Maxflow Corporation (collectively referred to as the "Scheduled Creditors"). The Schedules did not list Alpine, Northwest or a third creditor, Silver Mountain Christmas Trees ("Silver") (collectively referred to as "Appellees"). The clerk of the bankruptcy court sent a "Notice of Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines" to the Scheduled Creditors.

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[3]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

Subsequently, on March 11, 2003, Appellant amended the Schedules to add twenty-three creditors, including Appellees. The claims bar date was originally set for July 10, 2003 but was later extended to August 5, 2003. Appellees did not file proofs of claims in the chapter 12 case and did not object to confirmation of Appellant's chapter 12 plan.

On December 3, 2004, Silver placed a keeper in Appellant's business. Silver withdrew the keeper on the same day, after receiving a call from Appellant's bankruptcy attorney, David Britton ("Britton"), informing Silver of the chapter 12 case. According to Silver, this was the first notice it had received concerning the chapter 12 case. On January 21, 2005, Silver filed a motion to dismiss the chapter 12 case for lack of subject matter jurisdiction and as a fraud upon the court. Alternatively, Silver asked the bankruptcy court to except its claim from Appellant's discharge on the grounds that it had not received timely notice of the bankruptcy case.

The bankruptcy court conducted a preliminary hearing on Silver's motion on February 25, 2005. An evidentiary hearing was conducted on July 16, 2005. For the most part, direct testimony was submitted by declaration. However, the declarants were present at the hearing and were cross-examined. Appellant's principal witnesses were Britton's secretary and the attorney for Ford Motor Credit ("Ford"), a creditor added to Appellant's schedules at the same time as Appellees.[4] Silver's principal

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[4]Britton's secretary ("Vallone") testified that, prior to the claims bar date, she served Appellees with notice of the amended schedules, naming them as creditors. Copies of the documents were admitted into evidence. Vallone testified that none of the documents in question were returned as undeliverable. Ford's (continued...)

witnesses were its owners, James and Shirley Heater (the "Heaters"), Northwest's president, Grady Euteneier ("Euteneier"), and Alpine's chief executive officer, Gred Reid ("Reid").[5]

The bankruptcy court ultimately found that Silver had presented clear and convincing evidence of not having received timely notice of the bankruptcy case. As a result, the court granted Silver's motion to declare its debt excepted from Appellant's discharge. Silver's attorney then asked the court to extend this ruling to Northwest and Alpine.

Although the court initially expressed some reluctance to extend the ruling to Northwest and Alpine, given the fact that only Silver had filed the motion seeking this relief, Silver's counsel ultimately persuaded the court to do so. Silver argued that Appellant had received sufficient due process with respect to this relief because it knew that witnesses on behalf of Northwest and Alpine would testify at the hearing that they had not received timely notice of the chapter 12 case either. The bankruptcy court noted that requiring Alpine and Northwest to file their own

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[4](...continued)
attorney ("Herron") testified that he had received notice of the claims bar date prior to its expiration and had filed a timely proof of claim. He stated that he believed he had received written notice of the claims bar date through the mail.

[5]All of Silver's witnesses testified that their businesses were owed money by Appellant. Silver's and Northwest's claims had been reduced to judgment. All of Silver's witnesses testified that they had not received written notice of Appellant's chapter 12 case or of the amended schedules, naming them as creditors. The Heaters and Reid testified that they first learned of the chapter 12 case through a telephone call from Silver's attorney, Fred James ("James") in December 2004. Euteneier testified that he first learned of the chapter 12 case when he received notice of Britton's application for attorneys' fees in the same month.

motions would serve no purpose because the hearing on the motions would simply be a "repeat performance of the same evidence." Appellant filed a timely notice of appeal from the court's ruling with respect to Northwest and Alpine.[6]

ISSUES

1. Did the bankruptcy court abuse its discretion or deny Appellant's due process rights by declaring Alpine's and Northwest's claims excepted from Appellant's chapter 12 discharge when neither creditor had filed a motion or adversary proceeding, requesting such relief?

2. If not, did the bankruptcy court clearly err in finding that Alpine and Northwest did not receive timely notice of Appellant's chapter 12 case?

STANDARD OF REVIEW

On appeal, findings of fact are reviewed for clear error. In re Fowler, 394 F.3d 1208, 1212 (9th Cir. 2005). Conclusions of

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[6]While Appellant's Notice of Appeal named as appellees the chapter 12 trustee and all three Appellees (Silver, Northwest and Alpine), Appellant's opening brief did not challenge the court's ruling as to Silver. Further, Alpine and Northwest asserted both in their responsive brief and at oral argument that Appellant has not challenged the bankruptcy court's ruling with respect to Silver, and Appellant did not attempt to counter this assertion either by way of a reply brief or at oral argument. Consequently, Appellant has waived any challenge to the court's ruling with respect to Silver.

Alpine and Northwest also noted in their brief that, during the pendency of the appeal, Appellant had filed a new chapter 13 case. At the hearing, the Panel questioned whether relief from the automatic stay in this new case had been obtained to permit the appeal to proceed. See Ingersoll-Rand Financial Corp. v. Miller Mining Co., Inc., 817 F.2d 1424, 1426 (9th Cir. 1987). Upon learning that it had not, the Panel permitted argument to be presented but deferred taking the appeal under submission pending relief from stay being obtained. The parties subsequently stipulated to relief, and the bankruptcy court approved the stipulation.

law are reviewed de novo. In re Wolfberg, 255 B.R. 879, 881 (9th Cir. BAP 2000). Assertions of due process violations are reviewed de novo. In re Victoria Station, 875 F.2d 1380, 1382 (9th Cir. 1989).

DISCUSSION

As noted above, Appellant identified two issues on appeal. First, he contended that the bankruptcy court abused its discretion and/or denied him his constitutional due process rights given the absence of any motion or adversary proceeding requesting the relief granted. Second, he contended that the bankruptcy court made a clearly erroneous factual finding by concluding that Northwest and Alpine had not received timely notice of the chapter 12 case.

Because we agree with Appellant's first contention, we need not reach the second issue. We conclude that the bankruptcy court abused its discretion and denied Appellant his due process rights under the United States Constitution by declaring Northwest's and Alpine's claims excepted from his chapter 12 discharge in the absence of prior notice.

Appellees argue that Appellant's due process rights have been satisfied because, as the bankruptcy court found, Appellant was on notice that Northwest and Alpine would be present at the evidentiary hearing and would testify that they had not received timely notice. Their declarations were filed six months prior to the hearing. Appellant had the opportunity to cross-examine them and in fact did so. Appellees further argue that the bankruptcy court's ruling promoted judicial economy. As the court stated, requiring Northwest and Alpine to file their own motions would

have resulted in a repeat performance, with the same evidence being presented at the subsequent hearing. While we recognize the practicality of this approach, we are unable to find that it complies with a party's constitutional due process rights.

"It is fundamental that due process of law requires 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" United States v. Levoy, 182 B.R. 827, 833 (9th Cir. BAP 1995) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). Here, Appellant did not receive notice reasonably calculated, under all circumstances, to apprise him that relief was being sought with respect to Northwest and Alpine as well as with respect to Silver. He received no advance notice that this relief would be requested. Silver made the request on behalf of Northwest and Alpine with no prior warning, after the bankruptcy court made its ruling with respect to Silver.

Under Rule 7001, the determination of whether a debt is dischargeable must normally be made through an adversary proceeding. Fed. R. Bankr. Proc. 7001(6). An adversary proceeding requires the filing of a complaint and the service of a summons. Fed. R. Bankr. Proc. 7003 & 7004. Here, the court permitted the determination to be made in the context of a motion. A motion procedure typically provides less notice than an adversary proceeding. In re Loloee, 241 B.R. 655, 660 (9th Cir. BAP 1999). Arguably, this was error even with respect to Silver.

In Loloee, we held that a bankruptcy court erred by purporting to resolve a lien priority dispute in the context of a

motion to sell real property free and clear of liens rather than through an adversary proceeding. 241 B.R. at 657. In addition, we noted that the notice of motion had not even been served in the manner prescribed by the local bankruptcy rules, which required personal service given the shortened notice period. 241 B.R. at 658. We also noted that the bankruptcy court signed "the order without a hearing, on the day before the scheduled hearing, without making any independent determination, and without making findings of fact and conclusions of law." Id. We reversed, stating that "due process...cannot be circumvented by sneaking the issue [of a lien priority dispute] into a motion to sell property free and clear of liens...." 241 B.R. at 659.

Here, the denial of due process was even more evident. There was no advance notice given to the Appellant that a request would be made in the context of Silver's motion to except the claims of Alpine and Northwest from Appellant's discharge. As we stated in Loloee:

> Parties are entitled to presume that the court will comply with applicable rules of procedure and that they will receive the notice that is usually required.
>
> ...[T]he greater the deviation from prescribed procedure, the greater the quality and amount of notice needed in order to comply with due process.
>
> One, then, must compare the notice that was actually given with the notice that would have been given if the rules of procedure had been followed. Whether the difference is enough to flunk basic due process requirements is, in the end, a matter of degree.

Loloee, 241 B.R. at 662.

In Loloee, we found the deviation from the prescribed procedure sufficiently great to compel the conclusion that the lienholder's due process rights had been violated. Even more so, that conclusion is compelled by the facts presented in this case.

Moreover, the bankruptcy court could not fairly conclude that it would serve no practical purpose to require Northwest and Alpine to file their own proceedings seeking to except their claims from Appellant's discharge. Silver's claim was only for approximately $15,000. Alpine's claim was for approximately $12,000, and Northwest's was for approximately $40,000.[7] Had Appellant known that the dischargeability of Alpine's and Northwest's claims were also at stake, he might have employed a different litigation strategy. Under the circumstances, in keeping with our ruling in Loloee, we find that due process requirements were not satisfied when the bankruptcy court held that Alpine's and Northwest's claims were excepted from Appellant's discharge in the absence of any pending motion or adversary proceeding requesting such relief. Denial of a party's due process rights necessarily constitutes an abuse of discretion. Therefore, on both grounds, the appeal should be granted, and the bankruptcy court's order reversed.

CONCLUSION

The bankruptcy court's order with respect to Alpine and Northwest is REVERSED because Appellant did not receive sufficient notice to satisfy procedural due process and because the bankruptcy court abused its discretion by granting relief as to

[7]The claim amounts for Alpine and Northwest are based on the undisputed representations of counsel made at oral argument.

these two creditors in the absence of a pending proceeding requesting such relief. As a consequence, we do not reach the merits of whether the bankruptcy court erred by finding that Alpine and Northwest did not receive timely notice of the chapter 12 case and that, therefore, their claims should be excepted from Appellant's discharge.